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No. 03-366

In the Supreme Court of the United States

NEW ORLEANS STEVEDORES AND SIGNAL MUTUAL ADMINISTRATION, LTD., PETITIONERS

v.

PEGGY IBOS, SURVIVING SPOUSE OF BERTRAND IBOS, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, permits liability for an occupational disease claim to be assigned to the last covered employer who exposed the employee to conditions of a kind that produce the disease, prior to the date the employee becomes aware that he has the disease, without further inquiry into the extent to which the last employer's exposure caused the disease.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 317 F.3d 480. The decision and order of the Benefits Review Board of the United States Department of Labor (Pet. App. 18-30) is reported at 35 Ben. Rev. Bd. Serv. (MB) 50. The decision and order of the administrative law judge (Pet. App. 31-74) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2003, and a petition for rehearing en banc was denied on June 10, 2003 (Pet. App. 75-76). The petition for a writ of certiorari was filed on September

8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation and medical benefits to employees and their survivors for disability or death that results from an injury occurring at certain maritime locations. 33 U.S.C. 903(a), 907, 908, 909. The statute defines "injury" to include "accidental injury or death arising out of and in the course of employment, and *such occupational disease or infection as arises naturally out of such employment* or as naturally or unavoidably results from such accidental injury." 33 U.S.C. 902(2) (emphasis added).

The LHWCA makes "[e]very employer" liable for compensation payable to its employees, "irrespective of fault as a cause for the injury." 33 U.S.C. 904(a) and (b). Where more than one employer exposed the employee to conditions that may have caused or contributed to the employee's injury, the statute does not apportion liability among the employers. Instead, courts of appeals and the Director of the Office of Workers' Compensation Programs (OWCP), who administers the LHWCA for the Secretary of Labor, see 33 U.S.C. 939; 20 C.F.R. 701.202(a), have concluded that a "last employer rule" applies, under which full liability falls on "the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment." *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 145 (2d Cir.), cert. denied, 350 U.S. 913 (1955); see, *e.g.*, *Norfolk Shipbldg. & Drydock Corp.* v. *Faulk*, 228 F.3d 378, 384 (4th Cir.

2000), cert. denied, 531 U.S. 1112 (2001); *Bath Iron Works* v. *Brown*, 194 F.3d 1, 6 (1st Cir. 1999); *Avondale Indus., Inc.* v. *Director, OWCP*, 977 F.2d 186, 189-190 (5th Cir. 1992); *Todd Pac. Shipyards Corp.* v. *Director, OWCP*, 914 F.2d 1317, 1319 (9th Cir. 1990) (*Picinich*); *Argonaut Ins. Co.* v. *Patterson*, 846 F.2d 715, 719 (11th Cir. 1988).

2. Bertrand Ibos worked for 41 maritime employers between 1947 and his retirement on October 11, 1995. Pet. App. 10 n.7; see *id.* at 35-36. Petitioner New Orleans Stevedores (NOS) employed him at least twice, once in the 1950s and again between September 1993 and October 11, 1995. See *ibid.* Petitioner Signal Mutual Administration is the insurer liable for the latter period of NOS employment. See *id.* at 32.

During his last period of employment with NOS, Ibos was exposed to asbestos in December 1993 while unloading a ship called the *La Paix*. Pet. App. 62-63. He was also exposed to asbestos when he "went to [a] gear yard frequently" to retrieve equipment. *Id.* at 63.[1] In August 1995, he became short-winded at work and sought medical attention. *Id.* at 36; see *id.* at 2, 19. Medical tests showed a malignant tumor that was later diagnosed as mesothelioma, a cancer uniquely caused by inhalation of air-borne asbestos fibers. *Id.* at 36-37; see *Norfolk & W. Ry.* v. *Ayers*, 123 S. Ct. 1210, 1215

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[1] Petitioners overlook that finding when they assert (Pet. 5), incorrectly, that "Ibos was not personally aware of any other asbestos exposure while working for NOS, although later he claimed several off-site exposures, most of which the [administrative law judge (ALJ)] refused to credit as too speculative." The ALJ did not credit the claimant's assertion of asbestos exposure on the ships he worked on for NOS, but did credit the "uncontradicted and credible testimony" concerning asbestos exposure at the gear yard. Pet. App. 63.

(2003) (mesothelioma is "a fatal cancer of the lining of the lung or abdominal cavity"); 59 Fed. Reg. 40,964, 41,035 (1994) (preamble to OSHA asbestos standards).

After he stopped working, Ibos filed a claim for disability benefits under the LHWCA. Pet. App. 32, 36. On February 14, 1996, he died of metastatic mesothelioma. *Id.* at 19, 38. His widow, respondent Peggy Ibos, then filed a LHWCA claim for death benefits and pursued her husband's disability claim. *Id.* at 19-20, 32.[2]

3. An administrative law judge (ALJ) awarded compensation. Pet. App. 31-74; see 33 U.S.C. 919(d); 20 C.F.R. 702.331 *et seq.* With respect to the disability claim, the ALJ found "that the record clearly established that [Ibos] was exposed to asbestos at NOS." Pet. App. 65. The ALJ also credited medical evidence that Ibos suffered from malignant mesothelioma related to occupational asbestos exposure. *Ibid.* The ALJ rejected petitioners' argument that the December 1993 *La Paix* incident did not cause any mesothelioma because "that is not the issue. The issue is whether exposure to asbestos caused injury." *Id.* at 67. The ALJ found that asbestos exposure at NOS injured Ibos by damaging his immune system and lung tissue and creating a risk of malignancy. *Ibid.*

Having found injurious asbestos exposure related to Ibos's NOS employment, the ALJ then concluded that

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[2] Respondent named NOS and two companies for whom Ibos had worked between 1978 and September 1993 as potentially responsible employers. Pet. App. 19-20. She settled her potential claims against those two companies, and NOS claimed a credit for the amounts of the settlements against its LHWCA liability. *Id.* at 32, 34-35. The ALJ and Benefits Review Board granted NOS a credit, but the court of appeals reversed on that issue. *Id.* at 11-15, 28-30, 70. Petitioners do not seek review of that issue. See Pet. 8 n.3.

Ibos was unable to work "due to his injurious asbestos exposure and malignant mesothelioma." Pet. App. 68. The ALJ thus awarded disability benefits from October 11, 1995, when Ibos stopped working, until his death on February 14, 1996. *Ibid.* Respondent received death benefits "beginning February 15, 1996, and continuing." *Id.* at 72; see 33 U.S.C. 909.

The ALJ concluded that NOS was liable for the awards under the "last employer" rule. Pet. App. 69-70. In particular, the ALJ reasoned that the claimant had established injurious exposure at NOS and that petitioners had failed to establish injurious exposure at a subsequent employer. *Ibid.* Petitioners appealed that ALJ ruling to the Benefits Review Board but did not dispute that NOS had exposed Ibos to asbestos or that the claims were compensable. *Id.* at 21, 23 n.1; see 33 U.S.C. 921(b)(3).

4. The Benefits Review Board affirmed. Pet. App. 18-30. The Board reasoned that, under the "last employer rule," the only way for petitioners to avoid liability was to demonstrate that Mr. Ibos's exposure to asbestos at NOS did not have the potential to cause his disease. *Id.* at 23. The Board concluded that petitioners had not made that showing. Based largely on Fourth and Ninth Circuit decisions, it rejected petitioners' argument that, "in light of the long latency period for the development of mesothelioma, [Ibos's] mesothelioma began long before he began working for NOS in 1993, and any additional exposure to asbestos during his employment with NOS had no impact on the course of his disease." *Id.* at 24; see *id.* at 24-27 (discussing, among other cases, *Faulk*, 228 F.3d at 387, and *Lustig* v. *United States Dep't of Labor*, 881 F.2d 593, 596 (9th Cir. 1989)). Having found that petitioners failed to establish that Mr. Ibos's asbestos exposure at

NOS lacked the potential to give rise to mesothelioma, the Board did not specifically address the ALJ's findings that such exposure actually harmed Ibos. Pet. App. 28 & n.2.

5. The court of appeals affirmed in relevant part. Pet. App. 1-17; see note 2, *supra*. The court rejected petitioners' argument that 33 U.S.C. 902(2) requires "a true causal link between Decedent's exposure [to asbestos] while working for NOS and the development of Decedent's mesothelioma." Pet. App. 6. Instead, the court agreed with the Director, OWCP that Section 902(2) requires only that "conditions of the employment be *of a kind* that produces the occupational disease." *Ibid.* In the court's view, that interpretation was consistent with congressional intent as construed by the Second Circuit in adopting the last employer rule in *Cardillo*. *Id.* at 6-8. Because substantial evidence supported the ALJ's determination that NOS exposed Ibos to conditions of a kind that cause mesothelioma, the court concluded that the Board properly affirmed the ALJ's awards of compensation. *Id.* at 8-10; see 33 U.S.C. 921(b)(3) (ALJ findings are conclusive on Board if supported by substantial evidence).[3]

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[3] In reaching that conclusion, the court stated that a LHWCA claimant first has to establish a prima facie case of entitlement to benefits by showing that he sustained physical harm and that conditions at work could have caused the harm, after which the burden shifts to the employer to prove either that exposure to injurious stimuli did not cause the harm or that a subsequent employer exposed the employee to harmful conditions. Pet. App. 8 & 9 n.4; see 33 U.S.C. 920(a) (presumption, in the absence of evidence to the contrary, that the claim comes within the LHWCA). Petitioners do not directly challenge the court's allocation of these burdens of proof. See Pet. 19 n.8 (arguing that, to the extent that the court's interpretation of 33 U.S.C. 902(2) creates an

Like the Board, the court of appeals noted that the Fourth and Ninth Circuits had rejected arguments similar to petitioners', *i.e.*, that courts should not impose liability on an employer who exposed an employee to asbestos for only a short period before manifestation of the cancer because there is a long latency period between exposure to asbestos and manifestation of the disease. See Pet. App. 9 n.5. In addressing petitioners' "due process concerns," the court further noted its agreement with the Director that "the [NOS medical-opinion] estimates of the latency period, ranging from ten to forty years, suggest that the 'responsible' employer in [Ibos's] case may possibly have been any one of the forty-one longshore employers he worked for over the course of his entire career." *Id.* at 10 n.7. It concluded that petitioners' medical evidence concerning latency thereby demonstrates that the last exposure rule is still necessary in administering the LHWCA. *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of any other court of appeals. Indeed, petitioners have cited no case with comparable facts that raised the specific question presented in this case. See Pet. 12 (noting that cases applying the well-settled "last employer rule" "do[] not address the circumstances presented here"). Accordingly, further review by this Court is not warranted.

1. a. Petitioners argue that the decision below is incompatible with the LHWCA because the definition of "injury" in Section 2(2) of the statute is most natu-

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"irrebutable presumption," it "very likely" violates the Administrative Procedure Act).

rally read to mean that an occupational disease must be causally related to an employee's employment with the employer against which a claim is filed. See Pet. 17-19. That is incorrect. As the court of appeals noted, the LHWCA's definition of "injury" means (1) an "accidental injury or death arising out of and in the course of employment," and (2) "such occupational disease or infection" that either (a) "arises naturally out of such employment" or (b) "naturally or unavoidably results from such accidental injury." 33 U.S.C. 902(2). There is nothing in the statutory definition that requires proof that a particular employer actually caused the occupational disease, so long as the disease can be tied to covered maritime employment.[4]

Thus, while an "accidental injury" (*e.g.*, a fracture resulting from a fall) can typically be tied to employment with a particular employer, and indeed pinpointed as to time, place and circumstance, an "occupational disease" (*e.g.*, asbestos-induced mesothelioma), which may result from multiple exposures over time and may take decades to develop or manifest itself, typically cannot be so tied. Accordingly, an occupational disease is compensable if it "arises naturally out of such employment," even if the exact occurrence in the course of the employment out of which it actually "arose" cannot be known. 33 U.S.C. 902(2).

Imposing liability on the last employer to expose the employee to conditions "of a kind" that naturally causes the disease is consistent with Congress's intent to compensate diseases that arise over a period of time without an inquiry into the specific time, place, or

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[4] As this case illustrates, longshore workers commonly work for numerous maritime employers during the course of their employment.

circumstances under which the disease arose. See Pet. App. 6. As the court of appeals recognized, the last employer rule seeks to avoid uncertainties and delays that would result from trying "to correlate the progression of the [occupational] disease with specific points in time or specific industrial experiences." *Id.* at 7 (quoting *Cardillo*, 225 F.2d at 145).

The legislative development of the LHWCA provides additional reasons to believe that Congress intended courts to apply the "last employer" rule in this manner. First, Congress was aware, when it enacted the LHWCA, that its definition of "injury" would likely result in a last employer being liable for a disease that "may not have been attributable at all to the employment by the last employer." *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearing on H.R. 9498 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 74 (1926) (statement of O. G. Brown). Instead of amending the statute to change this result, as an employer representative requested, Congress retained the definition in relevant part. See *id.* at 1-2 (proposed definition of "injury"); *id.* at 74-75 (statement of Rep. Bowling, asking why the last employer should not be charged with liability); Longshoremen's and Harbor Workers' Compensation Act (Act of Mar. 4, 1927), ch. 509, § 2, 44 Stat. 1424 (definition of "injury"). That legislative history is fairly read to indicate a congressional intent to permit imposition of liability on the last employer for a disease that may not, in fact, be attributable to employment at that employer. See *Cardillo*, 225 F.2d at 145; cf. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 478 (1992) (relying on hearing testimony in determining congressional intent in 1984 LHWCA amendments).

Second, in its most recent amendments to the LHWCA, Congress decided not to "disturb the liability allocation and insurance coverage rules" that the Second Circuit articulated in *Cardillo*. H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 28 (1984). As discussed above, the test in *Cardillo* is based on an interpretation of congressional intent, when the LHWCA was enacted in 1927, to place full liability "on the last exposing employer, regardless of the absence of actual causal contribution by the final exposure." Pet. App. 6 (quoting *Cardillo*, 225 F.2d at 145). Congress has therefore accepted an allocation of liability under the LHWCA that does not require an actual causal connection between exposure and disability from an occupational disease.[5]

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[5] Petitioners also assert that the court erred by giving deference to the Director where "[t]he Department has no relevant regulation, has never held rulemaking proceedings or hearings and has produced nothing more than briefs advocating the position to which deference is accorded." Pet. 22. Petitioners fail to mention that the court of appeals gave only limited deference based on "the thoroughness evident in [the Department of Labor's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Pet. App. 4 (citations and internal quotations omitted). Petitioners also erroneously state that the Department had "no body of evidence" to support its position and simply gave a "'me too' reaction to fairly unenlightening legislative history." Pet. 22. The Department's position is supported by long experience administering the LHWCA. See *Cardillo*, 225 F.2d at 144 (discussing administrative practice). Deference is appropriate because of the Department's experience and "the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States* v. *Mead Corp.*, 533 U.S. 218, 234 (2001).

b. Petitioners also err in disputing (Pet. 19-24) the policy rationales for a rule that imposes liability on the last employer to expose an employee to conditions of a kind that produce an occupational disease. As the court of appeals recognized, petitioners' own medical evidence "validates the Director's argument that the last exposure rule is still necessary for administering the statute." Pet. App. 10 n.7. That evidence includes a variety of medical estimates of the latency period between asbestos exposure and manifestation of mesothelioma, ranging from 10 to 40 years. *Ibid.*; cf. *Ayers*, 123 S. Ct. at 1215 n.4 ("The latency period for asbestos-related disease is generally 20-40 years from exposure."). Given the uncertainty about the length of the latency period for mesothelioma, administrative adjudicators would have no way of identifying which employer(s) exposed an employee to the asbestos that actually caused the disease to be manifest years later. See Pet. App. 10 n.7 (any one of Ibos's 41 employers, over a nearly 45-year span, could potentially be responsible); *id.* at 35 (NOS itself employed Ibos in the 1950's). Any effort to hold the "truly responsible" employer liable would not only be speculative, but could reasonably be expected to result in increased delays (and expenses) in claims adjudication, contrary to "the employees' interest in receiving a prompt and certain recovery for their industrial injuries" and "the employers' interest in having their contingent liabilities identified as precisely and as early as possible." *PEPCO* v. *Director, OWCP*, 449 U.S. 268, 282 (1980).

Moreover, petitioners' "last truly responsible employer" rule (Pet. 19) would be just as much a rule of "administrative convenience" as the current rule, but would be more difficult to administer because of the difficulty of tracking down long past employers, the

greater possibility that those employers or their insurers are no longer in business, the challenge of reconstructing employment and exposure histories from decades past, the endless battles of medical experts that could ensue over determining the "correct" latency period, and the relevance of other factors (*e.g.*, exposure to other toxic chemicals or use of tobacco products) that could have hastened or retarded the onset of the disease. Given the virtual impossibility of determining what the actual latency period was in a given case or which exposure(s) actually caused the disease where exposure from more than one employer occurred over a number of years, the quest for the last employer who is "truly responsible" would prove costly, inefficient, time-consuming, and often fruitless.[6]

The rule adopted by the Director and the court of appeals is well within the range of permissible approaches. Petitioners themselves admit that in "the great majority of cases" the rule is fair because all employers will be the last employer a proportional share of the time. Pet. 23. In the small minority of cases that apparently concern petitioners, the rule is also fair to employers because they can avoid potential liability by not exposing their employees to asbestos. See Pet. App. 10. NOS exposed Ibos to that hazardous sub-

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[6] Latency periods are generally expressed as a range and, even if agreed upon as scientifically accurate, are not meant to rule out the possibility of an individual manifesting the disease in less time than the low end of the range indicates for the general population. Further complicating the search for petitioners' "last truly responsible employer" is the fact that a single substance may cause more than one disease (*e.g.*, mesothelioma and asbestosis) with different latency periods, suggesting that more than one employer may have to be held responsible unless the Director's "last employer" rule is applied.

stance in sufficient quantities to have caused mesothelioma and other asbestos-related diseases and therefore appropriately incurred the risk of liability.[7]

2. Contrary to petitioners' assertions (Pet. 12-16), the court of appeals' holding does not conflict with any decision of any other court of appeals. Rather, as petitioners appear to recognize (see Pet. 12 (noting that cases applying the "last employer rule" "do[] not address the circumstances presented here")), no prior court of appeals decision has considered the specific issue presented in this case.

In particular, the court of appeals' decision is consistent with the Fourth Circuit's decision in *Norfolk Shipbuilding & Drydock Corp.* v. *Faulk*, 228 F.3d 378, 384-388 (2000), cert. denied, 531 U.S. 1112 (2001), which imposed liability on the last employer to expose an employee to asbestos despite an argument that the long latency period between asbestos exposure and disease

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[7] Because Congress has the authority to require employers to compensate employees whose health is impaired by conditions at work, and imposing liability on the last employer to expose an employee to conditions of a kind that produces a disease is a rational way of spreading the costs of such exposures, this case presents no serious constitutional question. See, *e.g.*, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-23 (1976) (discussing principles); *Newport News Shipbldg. & Dry Dock Co.* v. *Stilley*, 243 F.3d 179, 184 (4th Cir. 2001) (applying *Turner Elkhorn* to last employer rule). Nor does the approach adopted below erect "a de facto irrebuttable presumption of responsibility based solely on exposure." Pet. 19 n.8. The employer may escape liability if it can show that it did not expose the employee to the causative substance or that the only exposure it caused occurred after the employee's disease manifested itself, see *Port of Portland* v. *Director, OWCP*, 932 F.2d 836, 840-841 (9th Cir. 1991) (*Ronne*), or was too minimal to have had even the potential to cause disease, see *Picinich*, 914 F.2d at 1319-1322.

meant that the employer could not have caused the employee's disease. Contrary to petitioners' assertion (Pet. 14, 16), the *Faulk* court's rejection of the latency argument did not rest solely on the last employer's failure in that case to prove its argument that the latency period for the asbestos-related disease was too long for any exposure by that employer to have been a cause of the disease. Rather, the Fourth Circuit expressly agreed with the analysis of the Ninth Circuit in *Lustig* v. *United States Department of Labor*, 881 F.2d 593, 596 (1989), which had rejected an identical latency argument as a matter of law. See *Faulk*, 228 F.3d at 386-387. In *Lustig*, the Ninth Circuit held that permitting the last employer to have exposed the employee to injurious stimuli before the disease was detected to evade liability based on the long latency of the employee's disease would work an "unwarranted change" of the rule set forth in *Cardillo*. 881 F.2d at 596. Although the Fourth Circuit in *Faulk* also examined the extent of the employee's exposure to asbestos while employed by the last employer, it did so to refute the employer's argument that a single incident of exposure shortly before the employee retired was not injurious. 228 F.3d at 387-388.[8]

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[8] The decision below is also consistent with the First Circuit decisions cited by petitioners. Pet. 16. See *Bath Iron Works Corp.* v. *Director, OWCP*, 244 F.3d 222, 229 (1st Cir. 2001) (insurer liable for period when employee became disabled "may not defend against liability by arguing that exposures [to environmental irritants] occurring before its coverage period inevitably would have led to the disability"); *Bath Iron Works* v. *Brown*, 194 F.3d 1, 6 (1st Cir. 1999) (no need to decide, in a hearing loss case, either "a last maritime or covered employer issue"). The Second Circuit decision cited by petitioners (Pet. 16) did not even address the last employer rule; instead, it addressed an employer's burden of proof

The decision below is also consistent with the Ninth Circuit decisions cited by petitioners. See Pet. 14-15. In *Picinich*, an administrative law judge determined that an employer was not liable for an employee's asbestos-related death when the employer exposed the employee only to a "minimal" amount of asbestos that was not "injurious." 914 F.2d at 1319. The Benefits Review Board reversed, holding that exposure to asbestos is by definition injurious. *Ibid.* The Ninth Circuit reversed the Board, holding that the employer could not be liable unless it exposed the employee to asbestos "'in sufficient quantities to cause the disease [asbestosis].'" *Id.* at 1320 (quoting *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280, 1286 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984)). Because substantial evidence supported the ALJ's finding that the employer's asbestos levels, which "were 250 times below the limit allowed by the government-prescribed level," could not even potentially cause the employee's disease, the Ninth Circuit reinstated the ALJ's decision. *Id.* at 1321-1322.

Picinich therefore holds that a minimal level of asbestos exposure, lacking even the potential to cause the disease, is not an injurious exposure for purposes of the last employer rule. That holding is consistent with the holding of the court below that an employer is liable when its employment conditions are "*of a kind* that produces the occupational disease." Pet. App. 6. Conditions that are sufficient to produce a disease, such as NOS's exposure in this case, cannot be equated with the minimal levels that lacked such potential in

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in rebutting a presumption of eligibility in 33 U.S.C. 920(a). See *American Stevedoring Ltd.* v. *Marinelli*, 248 F.3d 54, 64-65 (2d Cir. 2001).

Picinich. See also *Faulk*, 228 F.3d at 388 (distinguishing *Picinich* for similar reasons).

The decision below is also consistent with *Port of Portland* v. *Director, OWCP*, 932 F.2d 836 (9th Cir. 1991) (*Ronne*), and *Ramey* v. *Stevedoring Services of America*, 134 F.3d 954 (9th Cir. 1998). In *Ronne*, an employee was exposed to noise while working for several different LHWCA employers and filed a claim for occupational hearing loss. 932 F.2d at 838. The ALJ imposed liability on the last employer to expose the employee to noise before the employee took an audiogram that measured the amount of hearing loss. *Ibid.* The Benefits Review Board imposed liability on an employer who had exposed the employee to noise *after* the employee took the audiogram, but before the employee received the audiogram results. *Ibid.* The Ninth Circuit reversed the Board because it was "factually impossible" for noise exposure after the audiogram to have contributed in any way to the measured hearing loss for which the employee claimed compensation. *Id.* at 840-841. In *Ramey*, the Ninth Circuit considered whether an employee was injuriously exposed to noise at his last place of employment in light of *Ronne*. 134 F.3d at 959. The court concluded that he was because "conditions existed at his work that could have caused the [hearing loss]." *Id.* at 960.

Ronne and *Ramey* therefore explain how the last employer rule operates in hearing loss cases. In particular, *Ronne* explains that the last employer to expose the employee to noise before the determinative audiogram is liable, see 932 F.2d at 841, while *Ramey* says that the noise levels at the last employer's place of employment must be such that they "could have caused" hearing loss, 134 F.3d at 960. Neither case co-

siders how the last employer rule should apply in an asbestos case where there is an uncertain latency period between exposure to asbestos and manifestation of the disease. Cf. *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 163 (1993) (worker exposed to noise, unlike worker exposed to asbestos, suffers an immediate disability). Thus, the Ninth Circuit's requirement for a "rational connection" between an employee's employment and disability in a hearing loss case, Pet. 14, 15 (citing *Ronne*, 932 F.2d at 840), where exposure alone may equate to disability, see *Bath Iron Works*, 506 U.S. at 163, does not necessarily mean that the court would reject the test adopted by the Fifth Circuit in an asbestos case where there is a considerable time lag between exposure and any disability that may develop. To the contrary, the Ninth Circuit's use of a "could have caused" test, see *Ramey*, 134 F.3d at 960, suggests that the Ninth Circuit, like the Fifth Circuit, would not require proof of actual causation. See *Lustig*, 881 F.2d at 596 (rejecting latency argument in asbestos case); *Ronne*, 932 F.2d at 840 ("a demonstrated medical causal relationship between claimant's exposure and his occupational disease" is not required).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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